

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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SIERRA PACIFIC POWER COMPANY, a	)	
Nevada corporation,	)	
	)	3:04-CV-00034-LRH-RAM
Plaintiff,	)	
	)	
v.	)	<u>ORDER</u>
	)	
THE HARTFORD STEAM BOILER	)	
INSPECTION AND INSURANCE	)	
COMPANY, a Connecticut corporation, and	)	
ZURICH AMERICAN INSURANCE	)	
COMPANY, a New York corporation, as	)	
successor in interest to ZURICH	)	
INSURANCE COMPANY, US Branch,	)	
	)	
Defendants.	)	
_____	)	

Before the court is Plaintiff's Motion to Stay or Toll 3 Year Time to Rebuild Farad Until Final Disposition on Appeal and Remand to This Court (#204<sup>1</sup>). Defendants filed an opposition (#205), and Plaintiff filed a reply (#206).

**I. Facts and Procedural History**

This case involves a dispute about the extent of insurance coverage in policies that Plaintiff Sierra Pacific Power Company procured from Defendants Hartford Steam Boiler Inspection and

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<sup>1</sup>Refers to the court's docket entry number

1 Insurance Company and Zurich American Insurance Company. The coverage issues relate to the  
2 destruction by flood of the Farad Diversion Dam, which was owned and operated by Plaintiff.

3 Following a bench trial, on September 30, 2008, this court awarded declaratory relief and  
4 entered judgment in favor of Plaintiff in accordance with the court's Findings of Fact and  
5 Conclusions of Law. Doc. ## 164-165. Among other findings and conclusions, the court stated:  
6 "The actual time necessary to rebuild and replace Farad Dam with diligence and dispatch is three  
7 years following this court's Finding of Facts and Conclusions of Law." Doc. #164, p. 7. Also: "It  
8 is equitable to extend the two-year time period laid out in the policy to replace Farad for an  
9 additional three-year period following this court's order based on impossibility, and because of  
10 Hartford/Zurich's unreasonable, misleading and clearly erroneous coverage positions." *Id.* at 8.

11 On October 10, 2008, Plaintiff filed a motion to reconsider the court's determination of  
12 actual replacement cost. Doc. #166. On July 10, 2009, this court entered an order denying the  
13 motion and further ordering "that the three-year extension granted for the replacement of the dam  
14 is tolled by pendency and resolution of this motion." Doc. #182, p. 6. Plaintiff then filed a notice  
15 of appeal on August 5, 2009, and Defendants filed a notice of appeal on August 18, 2009. Doc.  
16 ##183, 187.

17 On August 3, 2010, Plaintiff filed the instant Motion to Stay or Toll 3 Year Time to Rebuild  
18 Farad Until Final Disposition on Appeal and Remand to This Court. Doc. #204. Citing Federal  
19 Rule of Civil Procedure 62, the motion requests "that this court stay its order of July 10, 2009  
20 effective from that last tolling date, and toll all periods of time respecting the rebuilding of Farad  
21 until 3 years from final disposition on appeal, and remand to this court." *Id.* at 2. Defendants  
22 oppose the motion, arguing that this court lacks jurisdiction to entertain the motion because "Sierra  
23 is not trying to stay execution on a judgment, but rather, asks this Court to modify the very  
24 judgment that is on appeal to the Ninth Circuit Court of Appeals." Doc. #205, p. 2. In reply,  
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1 Plaintiff denies that it is asking the court to modify the judgment on appeal and avers that it instead  
2 “seeks a stay pending appeal under FRCP 62.” Doc. #206, pp. 1-2.

## 3 **II. Discussion**

4 In substance, Plaintiff’s motion seeks to toll the running of the 3-year period granted by the  
5 court for rebuilding of the Farad Dam. A stay of this court’s judgment, however, would not  
6 accomplish such a result. Thus, to the extent Plaintiff requests a stay pending appeal under Rule  
7 62, the motion will be denied.

8 To the extent Plaintiff seeks modification, correction or clarification of this court’s  
9 judgment, this court lacks jurisdiction to grant such relief while the case is on appeal. However,  
10 where a timely motion is made for relief that the court lacks authority to grant due to the pendency  
11 of an appeal, the court may issue an indicative ruling stating that it would grant the motion if the  
12 court of appeals were to remand for that purpose. *See* Fed. R. Civ. P. 62.1(a); *Davis v. Yageo*  
13 *Corp.*, 481 F.3d 661, 685 (9th Cir. 2007). Rule 60 authorizes the court, “on motion or on its own,  
14 with or without notice,” to correct “a mistake arising from oversight or omission whenever one is  
15 found in a judgment, order, or other part of the record.” Fed. R. Civ. P. 60(a). While an appeal is  
16 pending, “such a mistake may be corrected only with the appellate court’s leave.” *Id.*

17 It was always the court’s intention that the three-year period for rebuilding the Farad Dam  
18 would be tolled until the conclusion of the litigation, including during the pendency of any appeal  
19 of the court’s judgment by the Defendants. The court’s omission of an express provision regarding  
20 appeals was an oversight. The court’s original intent is also implicit in its findings of fact and  
21 conclusions of law, including:

- 22 \* Plaintiff, as a publicly-traded, highly-regulated public utility, is “not in a position that  
23 would allow it to undertake the estimated \$19,800,000 expense necessary for the  
24 reconstruction and replacement of the Farad Dam unless there was some reasonable  
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1 assurance that it was insured for a significant portion of the expected reconstruction and  
2 replacement costs.” Doc. #164, p. 6.

3 \* “The actual time necessary to rebuild and replace Farad Dam with diligence and  
4 dispatch is three years following this court’s Finding of Facts and Conclusions of Law.”  
5 *Id.* at 7.

6 \* “The provision in the insurance coverage, which provided that in the event the property  
7 was not repaired, rebuilt or replaced within two years from the date of loss or damage  
8 was impossible to meet and . . . was not enforceable. *Id.* at 7-8. Furthermore, the two-  
9 year provision was “not material,” “waived,” “contrary to public policy as it was  
10 impossible to fulfill,” “excused,” and may not be asserted by Defendants due to their  
11 actions in intentionally misleading Plaintiff concerning available coverage. *Id.* at 8.

12 \* “It is equitable to extend the two-year time period laid out in the policy to replace Farad  
13 for an additional three-year period following this court’s order based on impossibility,  
14 and because of Hartford/Zurich’s unreasonable, misleading and clearly erroneous  
15 coverage positions.” *Id.* at 8.

16 Not tolling the three-year period during the pendency of an appeal by the Defendants is contrary to  
17 the court’s original intent and would allow Defendants to undermine the court’s findings of fact  
18 and conclusions of law and Plaintiff’s entitlement to equitable relief. Thus, if the Court of Appeals  
19 were to remand for the purpose of correcting or clarifying the judgment, the court would clarify its  
20 original intent by making it express that the three-year period granted for rebuilding Farad Dam  
21 should be tolled until the conclusion of the litigation, including during the pendency of any appeal  
22 by the Defendants.

23 IT IS THEREFORE ORDERED that Plaintiff’s Motion to Stay or Toll 3 Year Time to  
24 Rebuild Farad Until Final Disposition on Appeal and Remand to This Court (#204) is DENIED.

1 IT IS FURTHER ORDERED that the court hereby issues an indicative ruling that it would  
2 clarify and correct the judgment as described herein if the Court of Appeals were to remand for  
3 that purpose. Pursuant to Federal Rule of Civil Procedure 62.1(b), Plaintiff shall promptly notify  
4 the circuit clerk under Federal Rule of Appellate Procedure 12.1 of the court's indicative ruling.

5 IT IS SO ORDERED.

6 DATED this 5th day of February, 2011.



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LARRY R. HICKS  
UNITED STATES DISTRICT JUDGE